

IN THE

**United States Circuit Court
of Appeals**

FOR THE

NINTH CIRCUIT

BROADWAY TOWER STORE COMPANY

a corporation, and

ASTOR BROS.

Appellants.

vs.

BROOKS MAVER COMPANY,

a corporation.

Appellee.

Filed

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On Appeal from the District Court of the United
State, for the District of Oregon.

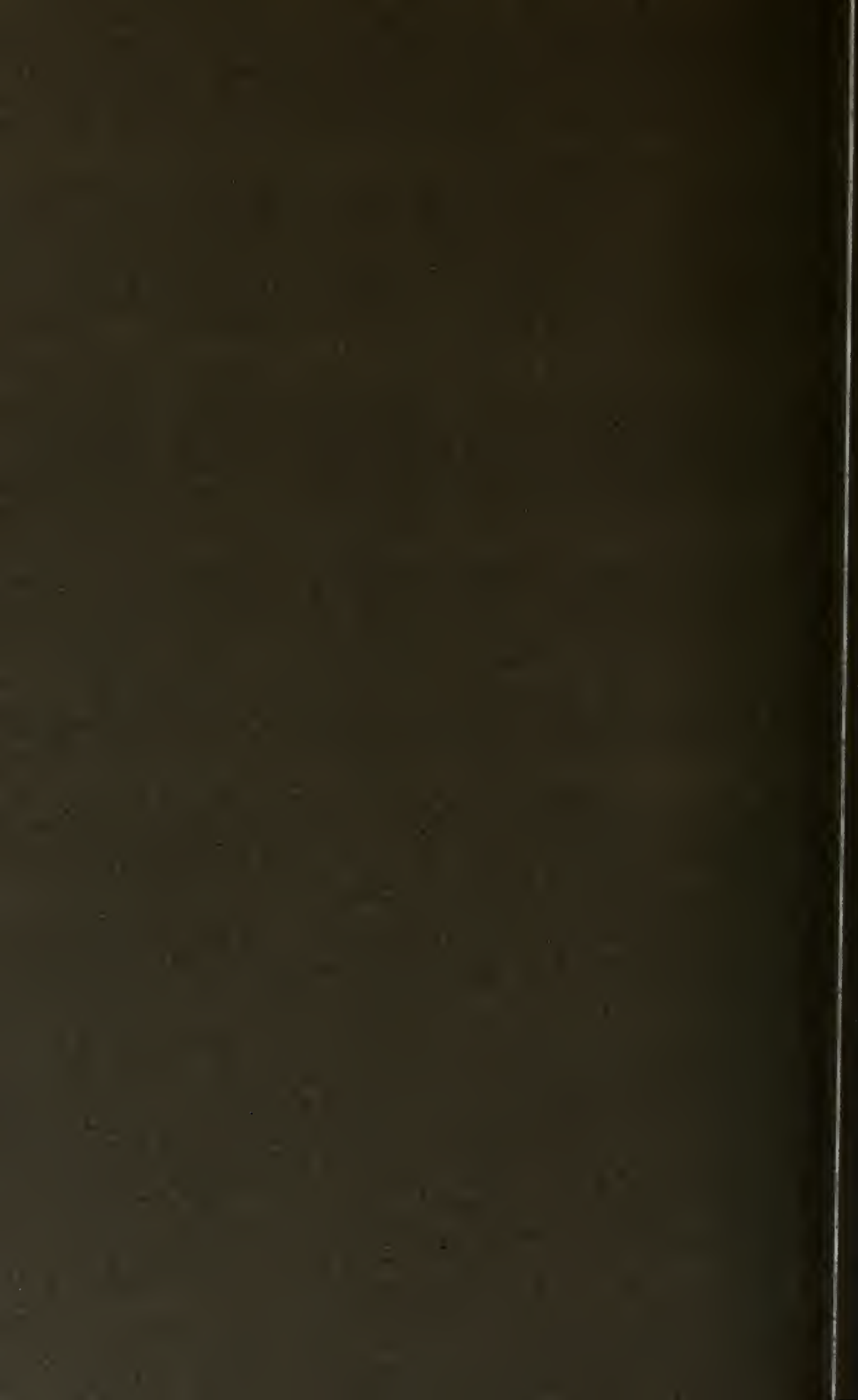
**APPELLANTS' REPLY BRIEF TO APPEL-
LEES' SUPPLEMENTAL BRIEF.**

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IN THE

**United States Circuit Court
of Appeals**

FOR THE

NINTH CIRCUIT

BROADWAY TOWEL SUPPLY COMPANY,
a corporation, and

AMOS BURG,

Appellants,

vs.

BROWN-MEYER COMPANY,
a corporation,

Appellee.

No. 2971

On Appeal from the District Court of the United
States for the District of Oregon.

APPELLANTS' REPLY BRIEF TO APPEL-
LEE'S SUPPLEMENTAL BRIEF.

ON THE MOTIONS.

Surely the questions to be reviewed are very plain. Appellee, in interjecting non-essential technicalities, and insisting that this court primarily deal with such, merely imposes useless labor.

Appellee's counsel was consulted in the preparation of the record, knew fully every point and step, and stipulated all over his own signature. Even stipulated as necessary the very papers he would now strike out of the record. See appellee's typewritten motion to dismiss, page 3, and compare stipulation of parties on page 100 of Transcript.

In regard to appellee seeking enlightenment on the details of practice of this circuit, appellants submit:

All rules of law and practice were, and are, intended to promote the administration of substantial justice; never to thwart such result.

Counsel for appellee has answered his own question when he states in his Supplemental Brief, page 17, that the rules of this circuit provide (rule 8) that "the practice shall be the same as in the Supreme Court of the United States as far as the same is applicable."

The spirit of promoting substantial justice pervades the whole equity fabric of our federal courts.

The Equity Rules established by the Supreme Court provide (rule 19) "The court, at every stage of the proceeding, must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

To the same end the Rules of Practice of the Supreme Court (rule 35) as well as all circuit courts of appeals, have a provision like the last clauses of rule 11 and rule 24:4 of this circuit, to the effect that "the court, at its own option, may notice a plain error not assigned."

In speaking of this provision in the case of *Mast & Co. v. Superior Drill Co.*, 154 Fed. 45, the C. C. A. 6th Cir. said (p. 51): "The underlying purpose of this reservation * * * is to prevent the miscarriage of justice from oversight."

Furthermore, appellee's complaint about the assignments of errors is mere quibbling.

The object of "assignment of errors is to enable the court and opposing counsel to see on what points the appellants intend to ask reversal of judgment, and limit the discussion to those points." *Phillips v. Seymour*, 91 U. S. 646, 648.

It is submitted that the assignments in this case, taken as a whole, have well fulfilled their office.

Take for example Assignment I (Trans. 96). This squarely and according to rule, raises the question of infringement.

In *Wessell v. United Mattress Mach. Co.*, 139 Fed. 11, 16 (C. C. A. 6th Cir.), the assignment of error was:

"The court erred in not dismissing the bill of complaint." It was said to be too general. The C. C. A. said "If this be so, we think the error is plain, and that we may, in the exercise of our discretion, *and ought to*, notice it. This defense was distinctly raised by the answer, the issue is *vital to the merits* of the controversy, and the case cannot be rightly decided without averting to it."

In a later case, *Lord Baltimore Press v. Labombarde*, 197 Fed. 739, the C. C. A. 4th Cir. reviewed similar questions as here presented by appellee.

The errors assigned were:

"1. The decree that defendant had infringed the patent; 2. The holding the patent to be valid."

Appellee moved to dismiss appeal because assignments did not conform to rule 11 of that circuit, presumably the same as like rule of this circuit.

The court—after referring to necessity for observing such rule, and that it had no intension of relaxing in its enforcement—said:

“We must, however, draw a *distinction between ordinary and patent cases* where the assignments are (a) the upholding or invalidating the infringement, and (b) the ascertainment of either infringement or non-infringement. In such cases, we cannot say that the assignment does not clearly and fully meet the requirement of the rule, when it alleges that the court below erred in holding the patent valid or invalid, or that infringement existed or did not exist. It is true such assignments require full and complete study of the whole record; but, in a patent case, where these defenses are relied on, such complete examinations of the record becomes a necessity.
* * * Therefore, in this case we must hold that the two first assignments are properly made.”

And assignments XI and XII ('Trans. 98) present duly and fully, by themselves, the errors complained of in the proceedings in the court below after the interlocutory decree. The errors charged are in awarding the plaintiff more than nominal damage, if any, on the evidence presented.

These assignments read:

XI.

In overruling the defendants' exception I to the report of the Master on accounting. The exception referred to fully states the reason therefor. Trans. 86.

XII.

In overruling the defendants' exception III to the report of the Master on accounting. Trans. 90.

Like exceptions have been approved by the C. C. A. 8th Cir. in *McSherry Mfg. Co. v. Dowagiac Mfg. Co.*, 163 Fed. 34, 35, holding:

“The Master had found in favor of the appellee the profits which it would have made * * * To this finding the appellant company excepted. This exception imposed on the lower court, and the assignment of that court’s ruling against the exception imposed upon this court, the duty of considering the evidence carefully to see if there was any legal evidence to support this finding.”

ON THE MERITS.

The repeated assertions of appellee that appellants admitted the validity of the patent in suit have impressed appellants that appellee is evidently nervous on this question.

The fact is, appellants did not admit, but denied that Brown had invented anything. Answer I, Trans. 7.

The further fact is, appellants really were not interested, because the alleged improvement over the prior art, purported to be covered by the patent in suit, is trivial. Even the customers of appellee laundry were not interested. “The customers are interested simply in the delivery of clean individual towels and the price.” Meyer’s Test., Trans. 77.

The remarks of the C. C. A. in *Wessel v. United Mattress Mach. Co.*, 139 Fed. 11, 16, apply:

“It is not necessary to determine whether these claims in the patent in suit are valid or not; that without the limitation by the specification, they are too broad; that they may be thus limited and construed to intend the specific devices described, and when so limited they are not infringed by the appellants.”

It is further to be said that appellants acted upon the facts disclosed by the File Wrapper of the patent in suit. Appendix to Trans., p. 105; see particularly pp. 109, 110. As there stated: "Claim 1 of the patent (originally claim 3, see Trans. 120, 121) calls for a combination in which both ends of the chain are secured to the assembling member or member 4. Reid shows no such construction. The inclusion of the wall by construction cannot be made in respect to claim 3, because applicant's assembling member 4 corresponds in *function* to Reid's number 1 and 1a. There is *distinct utility* in the subject matter of claim 1 (3) in that it *renders the entire length of the looped chain* available to the user of a towel, while the reach of the Reid's chain is much restricted." (Trans. 110.) See also comparative illustrations, appellants' Brief, p. 6.

Note: *The looped chain is THE DIFFERENTIATION, and the rendering of the entire length of the looped chain available is THE FUNCTION.*

Appellee now, in its Supplemental Brief, p. 10, contends:

"Examination of each claim of the patent, and particularly, for convenience, the first claim (the one just referred to) discloses beyond controversy that each covers a definite structure *without* any restriction as to *use*."

This assertion, that claim 1 covers merely a definite *structure*, without any restrictions as to *use*, is *contradicted* by the claim itself, which includes the functional limitation *for the purpose specified*." Trans. 106.

When appellants dropped the lower end of their towel stringing chain from the lower end of the towel assembling post to the bottom of the basket, they put their device into the very condition of the prior Reid

device which is said to *lack*—the great desideratum Brown discovered.

After said change of appellants' device, both ends of the chain were no longer secured to the towel-assembling member or post, and without such arrangement the *functional result*, alone due thereto was *not obtained*.

That is what the patentee impressed upon the Examiner of the Patent Office, and it was such differentiation which alone induced the Examiner to allow the application for patent.

It is apparent from the File Wrapper that there was a fair issue raised in the Patent Office, "requiring the applicant to yield directly a portion of what he claimed."

Reece Button-Hole Mach. Co. v. Globe Co., 61 Fed. 958, 969, C. C. A. 1st Cir.

"The position of the Patent Office was thereby discussed, and was fully understood by the applicant. It cannot be questioned that the issues made by it were substantial, and not incidental, while the invention is of a narrow and doubtful character, and necessarily to be carefully limited; so that the patentee must be held to the results of the proceedings on his application, and be restricted thereby."

Millard v. Chase, 108 Fed. 399, 402, C. C. A. 1st Cir.

Said definite structure, and for said functional purpose, cannot be eliminated from the claims without eliminating also the only feature possibly patentable, and rendering the whole patent void.

The question as to whether the Brown towel rack really embodies such improvement as may be legally termed a patentable invention, appellants submit to this

court without further argument. Even though appellee has not pressed that question, appellee cannot forbid this court from examining into the same.

Millard v. Chase, 108 Fed. 398, 401.

As said by this court in U. S. Consol S. Raisin Co. v. Selma Fruit Co., 195 Fed. 264, 268:

"Inasmuch as these matters *concern the public at large* the court will not allow parties to frame their issues in such a way as to take from it the scrutiny of all the questions which may be involved."

The prior Reid device seems to present the only real substance in these towel racks. This device substituted the flexible chain for the stiff rod formerly used, also provided practical means for connecting and disengaging the chain, as in substance admitted in the last paragraph, page 11 of appellee's supplemental brief.

THE REAL QUESTION IS, shall the injustice imposed by the decree of the lower court upon appellants be permitted to stand. Shall they be prohibited from using, and punished for having used, simple, everyday devices, merely because the appellee has ingenuously obtained an unintended and unlawful construction of the patent in suit?

Appellee tries to impugn the actions of appellants in their use of their device after its change to avoid infringement, by referring in its brief, page 8, to the fact that appellants' witnesses admitted on the stand that their device *might* be arranged so as to be like the Brown device.

But the fact remains that the good faith of appellants was never questioned.

Meyers, of appellee laundry, testified, Trans. 19: After December 1, 1914, "the lower end of the chain

was removed from the shackle of the lock, the lock was merely used thenceforth to keep the post in place—(note, just as in the Reid device) and the lower end of the chain instead of being in anyway connected with the shackle of the lock, or the bottom end of the post, was fastened to a ring in the basket.”

And this state of appellants use of their towel rack continued ever afterwards, as stipulated by appellee in court (last paragraph, Trans. 30), and again before the Master, Trans. (middle of page 82).

There was nothing unfair about appellants’ actions in any respect. The getting of a customer from appellee was merely due to fair competition. Trans. 78.

In short, appellants neither intended, nor used their device, when rearranged, to accomplish the same *function* as that claimed for the device described in the patent in suit. Such functional result appellees still monopolized without interference by appellants.

And the brief use of appellants’ towel racks in their original form is too trifling, it is submitted, to impose more than nominal damages. For such, appellants offered a fair settlement to appellee, before this suit was brought, in order to avoid litigation. See Answer, Trans. 11. And see testimony of Burg, appellant, Trans. 33-34, and note the unreasonable demand of appellee, Trans. 30. Appellant laundry made only \$7.50 on their entire towel business during that period, but offered \$25.00 to satisfy appellee and avoid litigation. But appellee magnanimously demanded \$500.00. Trans. 30.

This whole controversy is due to appellee attempting to make a wrongful use of its alleged patent. It used the patent law, intended primarily “to promote the progress of science and the useful arts” (Motion Pic-

ture Co. v. Universal Film Co., U. S. Supreme Ct. 238 O. G. 311, 313) for unlawful purpose. Appellee seeks to convict an innocent user, by bringing him into the *letter* of a patent, though *contrary to its true intent*.

This conduct recalls the remarks of the Supreme Court in *Atlantic Works v. Brady*, 107 U. S. 192, 200. The appellee by its conduct brings itself "in a class of speculative schemers who make it their business to watch the advancing wave of improvement and gather its foam in the form of patented monopolies, which enables them to lay a heavy tax upon the industry of the country, (in the case at bar, *taking all profits* from appellants' business of laundering and supplying individual towels) without contributing to the real advancement of the art."

Appellants' counsel apologizes for seeming proximity on so simple an issue as here presented. But if he transgressed, he did so in his endeavor to lighten and facilitate the work of the court, and to save his clients from injustice.

Respectfully submitted,

T. J. GEISLER,

Of Counsel for Appellants.